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*Lett & Massie* and *J. Winston Read*, all of Newport News, for plaintiffs in error.

*Nelms, Colonna & McMurran*, of Newport News, and *Taze-well Taylor*, of Norfolk, for defendants in error.

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CLAY v. BUTLER et al.

June 15, 1922.

[112 S. E. 697.]

**1. Guardian and Ward (§ 62\*)—Evidence Held to Prove Agreement between Broker and Guardian that Broker Should Divide with Guardian His Commission for Selling Wards' Land.**—In proceeding to confirm sale of wards' land, in which the court directed the commissioner to pay named broker 5 per cent. commission on the amount of the sales for his services in making the sale, but by subsequent decree ordered one-half of the amount of the commissions to be paid to the wards on the ground that agreement between broker and guardian requiring broker to divide his commissions with the guardian was illegal, evidence held to prove broker's agreement to divide commissions with guardian in the event that only 5 per cent. was allowed him for making the sale.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 803.]

**2. Guardian and Ward (§ 62\*)—Guardians Not Permitted to Make Profit Out of Ward's Property.**—Guardians, being trustees, are not permitted to make gains to themselves of trust property in their hands.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 809.]

**3. Contracts (§ 138 (1)\*)—Opposed to Public Policy Will Not Be Enforced unless Enforcement Will Defeat Object of Illegal Transaction.**—A contract opposed to public policy will not be enforced unless enforcement will defeat the object of the illegal transaction, and promote the interest of society and the policy of the law.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 333.]

**4. Contracts (§ 142\*)—Whether against Public Policy Is Question for Court.**—Whether a contract is against public policy is to be determined by the court from all the circumstances of the case, and not by the jury.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 460.]

**5. Equity (§ 377\*)—Failure to Ask for Issue Out of Chancery Held to Constitute Waiver of the Right to Trial by Jury.**—In proceeding involving question as to disposition of broker's commission for sale of wards' land, in which court ordered that one-half thereof be paid wards on the ground that broker's contract to divide commission with guardian was illegal, the broker by failure to ask for an issue out of chan-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

cery waived the right to a trial by jury of the issue as to the existence of such an agreement.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 20.]

**6. Equity (§ 66\*)—He Who Seeks Equity Must Do Equity.**—He who seeks equity must do equity.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 731.]

**7. Equity (§ 65 (1)\*)—He Who Comes into Equity Must Come with Clean Hands.**—He who comes into equity for relief must come with clean hands.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 733.]

**8. Fraud (§ 16\*)—Concealment of Material Fact Constitutes Fraud.**—If a party conceals a fact that is material to the transaction, knowing that the other party is acting on the assumption that no such fact exists, the concealment is as much a fraud as if the existence of the fact were expressly denied.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 460.]

**9. Guardian and Ward (§ 105 (1)\*)—Broker, Having by Fraud Induced Chancellor to Award Him Commission for Sale of Wards' Land, Held Estopped to Deny Jurisdiction of Subsequent Decree Ordering Part Thereof to Be Paid to Wards.**—In proceeding to confirm sale of wards' land, in which the court confirmed sale, and directed the commissioner to allow the broker who made the sale a 5 per cent. commission, but subsequently ordered one-half of such commission to be paid to the wards on the ground that broker's agreement to divide commission with guardian was illegal and void, the broker, having by concealment of knowledge as to existence of such contract constituting fraud induced chancellor to make prior decree awarding him commission, was estopped to deny jurisdiction of court to render subsequent decree ordering one-half thereof to be paid to the wards.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 803.]

Appeal from Circuit Court, Campbell County.

Proceeding by A. L. Butler, guardian, for confirmation of sale of wards' land. A decree was entered confirming the sale, and directing the commissioner to pay John Coles Clay 5 per cent. commission on the amount of the sales for his services in making the sale. From a decree directing that one-half of the amount of such commission be paid to the wards, John Coles Clay appeals. Affirmed.

*H. C. Featherston*, of Lynchburg, for appellant.

*Wilson & Manson*, of Lynchburg, and *Robert A. Russell* and *Frank Nelson*, both of Rustburg, for appellees

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.